



## **NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

### **48 CFR Part 1852**

#### **RIN 2700-AD70**

#### **Award Fee for Service and End-Item Contracts**

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Final rule.

**SUMMARY:** NASA has adopted, without change, a final rule amending the NASA FAR Supplement (NFS) to update the Award Fee for Service Contracts clause (NFS 1852.216-76) to clarify that the amount of award fee held in reserve, if any, shall not exceed \$100,000 for the contract, and add similar language to the Award Fee for End-Item Contracts clause (NFS 1852.216-77) to allow the contracting officer to withhold fee payments, at a not-to-exceed amount of \$100,000 for the contract, in reserve to protect the Government's interests relative to an orderly and timely closeout of the contract.

**DATES: Effective:** [Insert date 30 days after publication in the **FEDERAL REGISTER**.]

**FOR FURTHER INFORMATION CONTACT:** Bill Roets, NASA, Office of Procurement, Contract Management Division, Room 5G86; (202) 358-4483; e-mail: [william.roets-1@nasa.gov](mailto:william.roets-1@nasa.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **A. Background**

A proposed rule was published on September 15, 2011 (76 FR 57014) updating NFS clause 52.216-76 to clarify that the amount of withheld award fee shall not exceed \$100,000 for the contract revising paragraph (d) of this clause. As currently written, the clause specified a not-to-exceed amount of 15 percent of the contract's potential award fee, and on large multi-million dollar procurements, this reserve could total millions of dollars which would be excessive for the

intended purpose of this reserve. By capping this reserve at \$100,000, NASA will set the appropriate maximum dollar amount for this potential reserve and will align this clause with similar language in FAR clauses 52.216-8, Fixed-Fee, and 52.216-10, Incentive Fee.

Similar language relative to withholding a reserve amount of fee, not to exceed \$100,000, to protect the Government's interests relative to an orderly and timely closeout of the contract, is also being added to the Award Fee for End Item Contracts clause (NFS 1852.216-77).

NASA received no comments on the proposed rule and has adopted the proposed rule as a final rule without change.

### **B. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

### **C. Regulatory Flexibility Act**

NASA certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, at 5 U.S.C. 601, et. seq., because it merely updates, for clarification purposes, the maximum amount of award fee that can be withheld on a contract which will provide a benefit to all entities both large and small. In addition, award fee contracts are largely the province of large businesses with large dollar contracts and the changes promulgated in this final rule do not directly affect the current processes of Federal contractors. No comments from small entities were submitted in reference to the Regulatory Flexibility Act request under the proposed rule.

## **D. Paperwork Reduction Act**

The Paperwork Reduction Act (Pub. L., 104-13) does not apply because this final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, et seq.

## **List of Subjects in 48 CFR Part 1852**

Government procurement.

Sheryl Goddard,

Acting Assistant Administrator for Procurement

Accordingly, 48 CFR Part 1852 is amended as follows:

1. The authority citation for 48 CFR Part 1852 continues to read as follows:

**Authority:** 42 U.S.C. 2455(a), 2473(c)(1)

## **PART 1852--SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

2. Section 1852.216-76 is revised to read as follows:

### **1852.216-76 Award fee for service contracts.**

As prescribed in 1816.406-70(a), insert the following clause:

#### **AWARD FEE FOR SERVICE CONTRACTS**

( [Insert Abbreviated Month and Year 30 Days After Date of  
Publication in the Federal Register] )

(a) The contractor can earn award fee from a minimum of zero dollars to the maximum stated in NASA FAR Supplement clause 1852.216-85, "Estimated Cost and Award Fee" in this contract.

(b) Beginning 6\* months after the effective date of this contract, the Government shall evaluate the Contractor's performance every 6\* months to determine the amount of award fee earned by the contractor during the period. The Contractor may submit a self-evaluation of performance for each evaluation period under consideration. These self-evaluations will be

considered by the Government in its evaluation. The Government's Fee Determination Official (FDO) will determine the award fee amounts based on the Contractor's performance in accordance with [identify performance evaluation plan]. The plan may be revised unilaterally by the Government prior to the beginning of any rating period to redirect emphasis.

(c) The Government will advise the Contractor in writing of the evaluation results. The [insert payment office] will make payment based on [Insert method of authorizing award fee payment, e.g., issuance of unilateral modification by contracting officer].

(d) The Contracting Officer may direct the withholding of earned award fee payments until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect the Government's interest relative to an orderly and timely closeout of the contract. This reserve shall not exceed 15 percent of the contract's total potential award fee or \$100,000, whichever is less.

(e) The amount of award fee which can be awarded in each evaluation period is limited to the amounts set forth at [identify location of award fee amounts]. Award fee which is not earned in an evaluation period cannot be reallocated to future evaluation periods.

(f)(1) Provisional award fee payments [insert "will" or "will not", as applicable] be made under this contract pending the determination of the amount of fee earned for an evaluation period. If applicable, provisional award fee payments will be made to the Contractor on a [insert the frequency of provisional payments (not more often than monthly)] basis. The total amount of award fee available in an evaluation period that will be provisionally paid is the lesser of [Insert a percent not to exceed 80 percent] or the prior period's evaluation score.

(2) Provisional award fee payments will be superseded by the final award fee evaluation for that period. If provisional payments exceed the final evaluation score, the Contractor will either credit the next payment voucher for the amount of such overpayment or refund the difference to the Government, as directed by the Contracting Officer.

(3) If the Contracting Officer determines that the Contractor will not achieve a level of

performance commensurate with the provisional rate, payment of provisional award fee will be discontinued or reduced in such amounts as the Contracting Officer deems appropriate. The Contracting Officer will notify the Contractor in writing if it is determined that such discontinuance or reduction is appropriate.

(4) Provisional award fee payments [insert "will" or "will not", as appropriate] be made prior to the first award fee determination by the Government.

(g) Award fee determinations are unilateral decisions made solely at the discretion of the Government.

\* [A period of time greater or lesser than 6 months may be substituted in accordance with 1816.405-272(a).]

**(End of clause)**

3. Section 1852.216-77 is revised to read as follows:

**1852.216-77 Award fee for end item contracts.**

As prescribed in 1816.406-70(b), insert the following clause:

**AWARD FEE FOR END ITEM CONTRACTS**

**( [Insert Abbreviated Month and Year 30 Days After Date of  
Publication in the Federal Register] )**

(a) The contractor can earn award fee, or base fee, if any, from a minimum of zero dollars to the maximum stated in NASA FAR Supplement clause 1852.216-85, "Estimated Cost and Award Fee" in this contract. All award fee evaluations, with the exception of the last evaluation, will be interim evaluations. At the last evaluation, which is final, the Contractor's performance for the entire contract will be evaluated to determine total earned award fee. No award fee or base fee will be paid to the Contractor if the final award fee evaluation is "poor/unsatisfactory."

(b) Beginning 6\* months after the effective date of this contract, the Government will evaluate the Contractor's interim performance every 6\* months to monitor Contractor performance prior to contract completion and to provide feedback to the Contractor. The evaluation will be

performed in accordance with [identify performance evaluation plan] to this contract. The Contractor may submit a self-evaluation of performance for each period under consideration. These self-evaluations will be considered by the Government in its evaluation. The Government will advise the Contractor in writing of the evaluation results. The plan may be revised unilaterally by the Government prior to the beginning of any rating period to redirect emphasis.

(c)(1) Base fee, if applicable, will be paid in [Insert "monthly", or less frequent period] installments based on the percent of completion of the work as determined by the Contracting Officer.

(2) Interim award fee payments will be made to the Contractor based on each interim evaluation. The amount of the interim award fee payment is limited to the lesser of the interim evaluation score or 80 percent of the fee allocated to that period *less* any provisional payments made during the period. All interim award fee payments will be superseded by the final award fee determination.

(3) Provisional award fee payments will [insert "not" if applicable] be made under this contract pending each interim evaluation. If applicable, provisional award fee payments will be made to the Contractor on a [insert the frequency of provisional payments (not more often than monthly)] basis. The amount of award fee which will be provisionally paid in each evaluation period is limited to [Insert a percent not to exceed 80 percent] of the prior interim evaluation score (see [insert applicable cite]). Provisional award fee payments made each evaluation period will be superseded by the interim award fee evaluation for that period. If provisional payments made exceed the interim evaluation score, the Contractor will either credit the next payment voucher for the amount of such overpayment or refund the difference to the Government, as directed by the Contracting Officer. If the Government determines that (i) the total amount of provisional fee payments will apparently substantially exceed the anticipated final evaluation score, or (ii) the prior interim evaluation is "poor/unsatisfactory," the Contracting Officer will direct the suspension or reduction of the future payments and/or request a prompt refund of

excess payments as appropriate. Written notification of the determination will be provided to the Contractor with a copy to the Deputy Chief Financial Officer (Finance).

(4) All interim (and provisional, if applicable) fee payments will be superseded by the fee determination made in the final award fee evaluation. The Government will then pay the Contractor, or the Contractor will refund to the Government the difference between the final award fee determination and the cumulative interim (and provisional, if applicable) fee payments. If the final award fee evaluation is "poor/unsatisfactory", any base fee paid will be refunded to the Government.

(5) Payment of base fee, if applicable, will be made based on submission of an invoice by the Contractor. Payment of award fee will be made by the [insert payment office] based on [Insert method of making award fee payment, e.g., issuance of a unilateral modification by the Contracting Officer].

(d) The Contracting Officer may direct the withholding of interim award fee payments until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect the Government's interest relative to an orderly and timely closeout of the contract. This reserve shall not exceed 15 percent of the contracts total potential award fee or \$100,000, whichever is less.

(e) Award fee determinations are unilateral decisions made solely at the discretion of the Government.

\* [A period of time greater or lesser than 6 months may be substituted in accordance with 1816.405-272(a).]

**(End of clause)**

